TUONG AIK (SARAWAK) SDN. BHD.

v.

ARAB-MALAYSIAN EAGLE ASSURANCE BERHAD

HIGH COURT, SABAH & SARAWAK, SIBU
TUAN HJ. MUHAMMAD KAMIL BIN AWANG J
[SUIT NO. 47 OF 1991]
3 NOVEMBER 1995

INSURANCE LAW: *Marine insurance - Claim for loss - Evidence - Whether plaintiff had discharged onus of proof - Whether loss was caused by peril insured against - Meaning of "perils of the seas" - Section 55(1) Marine Insurance Act 1906 (UK).*

INSURANCE LAW: *Marine insurance - Repudiation of claim - Whether plaintiff put up a fraudulent claim - Whether plaintiff had failed to observe and exercise the utmost good faith in putting up a fraudulent claim - Effect on whole claim when claim is part fraudulent and part genuine - Section 17 Marine Insurance Act 1906 (UK).*

EVIDENCE: *Admissibility - Failure of defendant to object - Whether inadmissible evidence becomes admissible thereby.*

The plaintiff was the registered owner of a steel dumb barge named "Asiaweld VII" together with one unit of RB38 crane on board. On 26 August 1989 Asiaweld VII capsized at Kuala Rejang, losing the crane and suffering extensive damage to its deck and bulk. The barge and crane were insured under a marine policy by the defenants from 12 December 1988 to 11 December 1989. Thereafter the defendants appointed adjusters to carry out a survey and inspection on the damaged Asiaweld VII. Having done that, the adjusters requested the plaintiff to carry out the salvage operations and repairs on the barge.

The plaintiff engaged Messrs. Golden Dollars Shipping Sdn. Bhd. to carry out uprighting the works and Messrs. Seatrade Sdn. Bhd., a subsidiary of the plaintiff was engaged to repair the damaged parts of the barge. The total costs of uprighting operations, repairs and loss of crane was RM187,430. After the repair works had been done, the barge was sold to Golden Dollars Shipping Sdn. Bhd. for RM400,000 and the new owner had the name of the barge changed.

After 1 year 9 months the plaintiff submitted its claim under the marine policy for RM187,430 to the defendants. The claim had the following features:

(i) the anchor, anchor winch and landing bridge were claimed to have been repaired by the plaintiff initially but later on the plaintiff admitted the items were yet to be repaired and included in the claim.

(ii) the plaintiff's photograph of the barge sent to the adjusters were actually photographs of another barge.

The defendant then repudiated the said marine policy on the ground that the plaintiff had failed to exercise the utmost good faith by submitting the photos of another barge to its claim. The plaintiff filed suit and the matter was tried. The issues were (i) whether or not the plaintiff had discharged the onus of proof that the loss was caused by a peril insured against and (ii) whether the defendant is entitled to repudiate the claim on the ground that the plaintiff had failed to observe and exercise the utmost good faith in putting up a fraudulent claim.

Held:

[1] The burden of proving, on the balance of probabilities, that the subject matter insured i.e. the Asiaweld VII and its crane, was damaged and/or lost by perils of the seas, rivers, lakes and other navigable waters, lies on the plaintiff.

[2] The plaintiff failed to adduce any evidence to prove that the accident or danger that caused the sinking of the barge was created by the sea or river. As the location and proximate cause of the alleged accident had not been proven in evidence, there is a great doubt as to whether it was a danger created by the sea or river. The mere sinking of the barge *per se* is not sufficient to prove a peril of the sea or river. There must be some evidence of a casualty or fortuitous accident established by the plaintiff. The plaintiff has failed to discharge the onus of proof which lies upon it of establishing that the barge sank with the crane due to a peril insured against.

[3] The plaintiff's witness produced a master's report without calling the maker. Even though the defendant did not object to its admission, it does not become admissible thereby and remains inadmissible.

[4] The duty of utmost good faith extends to the making of claims and a breach of such a duty entitled the insurers to avoid a claim under the marine policy. A claim which contains a false statement of facts or which is supported by false evidence is clearly fraudulent.

[5] On the totality of the evidence, the defendants had proved beyond reasonable doubt that the plaintiff had submitted a fraudulent claim as they had falsely stated that certain items had been repaired and installed on the barge. Further, false evidence in the form of photographs of another barge and not Asiaweld VII had been submitted.

[6] The consequence of making a fraudulent claim is that the plaintiff forfeits all benefits under the marine policy. Even though the plaintiff's claim is

honest in relation to other parts of the claim, the entire claim fails as it is tainted with dihonest and fraudulent intent. The defendants had correctly elected to repudiate liability and defend the claim without avoiding the policy.

[Plaintiff's claim dismissed].

Cases referred to:

The "Melanie" United Oriental Assurance Sdn. Bhd. Kuantan v. W.M. Mazzarol [1984] 1 MLJ 260 ***(foll)***

American Home Assurance Co. v. Nalin Industries Sdn. Bhd. [1993] 3 CLJ 319 ***(foll)***

Rhesa Shipping Co. SA v. Edmunds & Anor. - The Popi M [1985] 2 All ER 713 ***(refd)***

Cia Martiartu v. Royal Exchange Assurance Corporation [1923] 1 KB 650, CA

The Freighter "Kien Kung" [1965] 2 MLJ 60 ***(refd)***

Aw Kew Lim & Ors. v. PP [1987] 2 MLJ 601 ***(refd)***

Goh Beng Seng v. Dol bin Dolah [1970] 2 MLJ 95 ***(refd)***

Packiam & Anor. v. PP [1972] 1 MLJ 247 ***(refd)***

Black King Shipping Corporation And Wayang (Panama) SA v. Mark Ranald Massie (The "Litsion Pride") [1985] Vol. 1 LLR 438 ***(refd)***

Continental Illinois National Bank & Trust Co. of Chicago and Xenofon Maritime SA v. Alliance Assurance Co. Ltd. (The "Captain Panagos DP") [1986] Vol. 2, LLR 511-512 ***(refd)***

Dome Mining Corporation Ltd. v. Drysdale [1931] LLLR Vol. 41-109 ***(refd)***

Lek v. Mathews [1927] LLLR Vol. 29-141 ***(refd)***

Teh Say Cheng v. North British and Mercantile Insurance Co. Ltd. [1921] FMSLR 248 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(3), 5(1)

Marine Insurance Act 1906 (UK), ss. 17, 55(1), First Schedule r. 7, 91

Other sources referred to:

General Principles of Insurance Law, E.R. Hardy Ivamy (5th Edn.), p. 413

Halsbury's Laws of England, Vol. 25, p. 273

For the plaintiff - H.K. Lau; M/s. H.K. Lau & Co., Sibu

For the defendants - Leonard David Shim; M/s. Reddi & Co., Kuching

JUDGMENT

Muhammad Kamil Awang J:

The plaintiff was the registered owner of a steel dumb barge named "Asiaweld VII" together with one unit of RB 38 crane on board. On 26 August 1989 Asiaweld VII capsized at Tg. Manis, Kuala Rejang, and as a result, the crane on board was lost and the barge suffered extensive damage especially to its deck and hull.

The Asiaweld VII and its crane were insured under a marine policy no. SB/200/00661/12 dated 23 December 1988 (Exh. P1) (hereinafter called the "marine policy") by the Arab-Malaysian Eagle Assurance Berhad (the defendants), valid for a period of one year from 12 December 1988 to 11 December 1989. On being informed of the unfortunate accident of Asiaweld VII, the defendants appointed Messrs. Kinabalu Adjusters & Surveyors Sdn. Bhd., to carry out a survey and inspection on the damaged Asiaweld VII. Having done that, the adjusters requested the plaintiff to carry out the salvage operations and repairs on Asiaweld VII. In response the plaintiff engaged Messrs. Golden Dollars Shipping Sdn. Bhd., to carry out the uprighting of the Asiaweld VII, and Messrs. Seatrade Sdn. Bhd., a subsidiary company of the plaintiff, to repair the damaged parts of the barge. The total costs for the uprighting operations, repairs and loss of crane was RM187,430.

On 7 June 1990 after the repair works had been done, the Asiaweld VII was sold to Golden Dollars Shipping Sdn. Bhd., for RM400,000, and the new owner had the name of the barge changed from "Asiaweld VII" to "M.V. Matrad 106".

It was after more than 1 year 9 months that the plaintiff submitted its claim for the sum of RM187,430 under the marine policy to the defendants. On 18 July 1991 the defendants in response to the plaintiff's claim repudiated the said marine policy on the ground that the plaintiff had failed 'to exercise the utmost good faith by submitting the photos of another barge' to its claim. Hence, the plaintiff brought this action.

At the commencement of this trial, the defendants with the leave of the Court, made a minor amendment to its statement of defence, in para. 7(c), by substituting for the figure "3", the figure "4" referring to the number of photographs involved.

The facts that at the relevant time the Asiaweld VII was covered by the marine policy and that the underwriters were the defendants were not in dispute.

It is provided under the marine policy that - "This insurance covers loss of or damage to the subject-matter insured caused by 6.1.1 perils of the seas rivers lakes or other navigable waters." The law of marine insurance as administered in England is applicable in this case by virtue of s. 5(1) of the Civil Law Act 1956. The Federal Court in *The "Melanie" United Oriental Assurance Sdn. Bhd. Kuantan v. W.M. Mazzarol* [1984] 1 MLJ 260 @ 264 held that the law applicable to marine insurance in Malaysia is the Marine Insurance Act 1906 UK:

> This Act is made applicable to Malaysia as part of our law by virtue of s. 5(1) of our Civil Law Act 1956.

a And s. 3(3) of the Civil Law Act 1956 provides:

> (ii) The Acts of Parliament of the United Kingdom applied to Sarawak under ss. 3 and 4 of the application of Laws Ordinance of Sarawak and as specified in the Second Schedule to this Act shall, to the extent specified in the second column of the said Schedule, continue in force in Sarawak
b with such formal alterations and amendments as may be necessary to make the same applicable in the circumstances of Sarawak and, in particular, subject to the modifications set out in third column of the said Schedule.

The Second Schedule of the Civil Law Act 1956 states that the whole (except s. 91) of the Marine Insurance Act 1906 of the United Kingdom continue in
c force in Sarawak with no modifications.

The fundamental issue for the Court to decide is whether or not the plaintiff has discharged the onus of proving that the loss was caused by a peril insured against.

d According to the *General Principles of Insurance Law* (5th Edn.), by E.R. Hardy Ivamy at p. 413:

> The onus of proving that the loss was caused by a peril insured against lies on the assured. Unless he discharges the onus, the claim must fail.

e This principle of law is restated by the Supreme Court in *American Home Assurance Co. v. Nalin Industries Sdn. Bhd.* [1993] 3 CLJ 319:

> The respondent (assured) bears the burden of establishing that its claim falls within the peril insured against. However, the onus of proving that the event comes under a certain exemption lies on the party repudiating the claim, the
f appellant.

Per Mohd. Eusoff bin Chin SCJ (as he then was) at p. 322:

> It is of course incumbent on the respondent as the plaintiff to establish that the loss it suffered arose out of an accident to an object covered by the policy. In
g *Regina Fur Co. Ltd. v. Bossam* [1958] 2 Lloyd's Rep. 425, Evershed MR held that the onus of proving that its case fell within the policy, remained at all times with the insured.

In this connection s. 55(1) of the Marine Insurance Act 1906 provides that:

h

> Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

i

It is trite law that the burden of proving, on the balance of probabilities, that the subject-matter insured, as in this case the Asiaweld VII and its crane, was damaged and/or lost by perils of the seas, rivers, lakes or other navigable water, lies on the plaintiff. The House of Lords in *Rhesa Shipping Co. SA v. Edmunds & Anor. - The Popi M* [1985] 2 All ER 713 said:

> Where a shipowner alleged total loss of his ship by perils of the sea the burden of proving, on the balance of probabilities, that perils of the sea was the real cause of the loss was, and remained throughout, on the shipowner even if the insurer chose to put forward another explanation for the loss dependent on a risk against which the shipowner was not insured.

Lord Brandon of Oakbrook delivering the judgment of the House cited with approval the *dictum* of Scrutton LJ in *Cia Martiartu v. Royal Exchange Assurance Corporation* [1923] 1 KB 650, CA as the correct principle of law applicable, at p. 714:

> That was a case in which the Court of Appeal, reversing the trial Judge, found that the ship in respect of which her owners had claimed for a total loss by perils of the seas, had in fact been scuttled with the connivance of those owners. Having made that finding, Scrutton LJ went on to say (at 657):
>
> > This view renders it unnecessary finally to discuss the burden of proof, but in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship ... and an examination of all the evidence leaves the Court doubtful what is the real cause of the loss, the assured has failed to prove his case.

Similarly, in *The Freighter "Kien Kung"* [1965] 2 MLJ 60 @ 62, Buttrose J held that:

> The true principle of law, I apprehend, now established by the authorities in relation to these matters is that the onus is on the plaintiffs to prove that the ship was lost by a peril insured against, in this case a peril of the sea ..., an onus which, in my judgment, they have failed to discharge.

The term "peril of the sea" as set out in the First Schedule to the Marine Insurance Act 1906, r. 7 states:

> The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

This term was considered in *The Melanie* (*supra)* wherein the Federal Court held that:

> There are many decided cases on the meaning and concept of perils of the sea. It is not necessary for us to go into the details of these cases as it is sufficient for our purpose to state here that peril of the sea is peril due to the sea and that it refers only to fortuitous accidents or casualties of the sea so that the

damage could not be expressly guarded against. It is not a peril of the sea if the accident is caused by ordinary action of the winds and waves. Thus the unexpectedness of the peril due to the action of the sea is the main element of the concept.

Further, the Federal Court held that, at p. 263:

> ... we are of the opinion that in view of the finding by the learned Judge that the accident was caused by the "Melanie" striking a submerged sandbank which was marked in the charts to be a sea-lane, it cannot be otherwise than a fortuitous danger, a danger which no human skill can possibly avoid and guard against. The danger having been created by the sea, the accident to the "Melanie" must be due to peril of the sea.

In the present case, the plaintiff had not produced any evidence to show that Asiaweld VII was capsized caused by a peril of the sea. There was no evidence adduced as to the type of fortuitous accident. There was no expert witnesses called: see *The Popi M* (*supra*). The master of tugboat "Hillog No. 3" or any member of the crew was not called to give evidence as to what happened to the Asiaweld VII on 26 August 1989: see *The Melanie* (*supra*). There was no explanation or reason given by the plaintiff for its failure to adduce such crucial evidence.

PW1 produced a master's report dated 30 August 1989 (Exh. P2) and it does not give any indication of what sort of fortuitous accident that caused the Asiaweld VII to capsize. Moreover, the master of the report was not called to give evidence and therefore Exh. P2 is an inadmissible evidence. It is noted that Exh. P2 is not an agreed document. The defendant made no objection to the admission of Exh. P2. An inadmissible evidence does not become admissible because of failure of Counsel to object to its admission. See *Aw Kew Lim & Ors. v. PP* [1987] 2 MLJ 601. Further in *Goh Beng Seng v. Dol bin Dolah* [1970] 2 MLJ 95 the High Court held that:

> It is the duty of the Court to disallow all inadmissible evidence even though no objection is taken to its admissibility. It cannot be rendered admissible by failure of Counsel to object to it.

In *Packiam & Anor. v. PP* [1972] 1 MLJ 247 Chang Min Tat J (as he then was) held that "inadmissible evidence does not become admissible by reason of the failure of Counsel to object thereto, and the appellate Court must disregard all such evidence."

The plaintiff failed to adduce any evidence to prove that the accident or danger that caused the sinking of Asiaweld VII was created by the sea or river. As the location and proximate cause of the alleged accident had not been proven in evidence, there is as such great doubt as to whether it was a danger created by the sea or river. The mere sinking of Asiaweld VII *per se* is not sufficient

to prove a peril of the sea or river. There must be some evidence of a casualty or fortuitous accident established by the plaintiff. In *The Freight "Kien Kung"* (*supra*) Buttrose J held that:

> The plaintiff must prove a casualty or accident. Perils of the seas do not fall within the class of losses, the mere happening of which is proof of the casualty. The mere sinking of a vessel beneath the waves, by itself, does not establish a loss by perils of the seas. There must, in my view, be some evidence of a casualty or, fortuitous occurrence and there is none here.

In this case, we are left completely in the dark as to what mishap caused the Asiaweld VII to sink, if sink she did. Mr. H.K. Lau submitted that it sank, but what is the cause for it to sink? Was it due to a peril of the sea? But what is the evidence of this? There is none.

The plaintiff did not call either the master or any member of the crew to give evidence as to what happened to the Asiaweld VII.

Where the Court is left in doubt upon the evidence whether the loss was due to a peril insured against or to some other cause not covered by the marine policy, the plaintiff had failed to discharge the burden which lies upon it of establishing that the loss is covered by the marine policy and the insurance company is entitled to judgment.

There must be some evidence of a casualty or fortuitous occurrence and there is none here. The plaintiff has failed to discharge the onus of proof which lies upon it of establishing that Asiaweld VII sank together with the crane was caused by a peril insured against.

This is sufficient to dispose of the case in the defendants' favour and they are entitled to judgment on this ground.

The second issue is whether the defendants are entitled to repudiate the claim on the ground that the plaintiff had failed to observe and exercise the utmost good faith in putting up a fraudulent claim.

Section 17 of the Marine Insurance Act 1906 provides:

> A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

The learned author of *General Principles of Insurance Law* (*supra*) states as follows:

> Since it is the duty of the assured to observe utmost good faith in his dealings with the insurers throughout, the claim which he puts forward must honestly be made; and if it is fraudulent, he will forfeit all benefit under the policy whether there is a condition to that effect or not.

The duty of utmost good faith extends to the making of claims and a breach of such duty entitles the insurers to avoid the plaintiff's claim under the marine policy. In the case of *Black King Shipping Corporation And Wayang (Panama) SA v. Mark Ranald Massie (The "Litsion Pride"*) [1985] Vol. 1 LLR 438, Hirst J held that: "the duty of utmost good faith extended to claims" and "the duty not to make fraudulent claims and not to make claims in breach of the duty of utmost good faith was an implied term of the policy." Further in *Continental Illinois National Bank & Trust Co. of Chicago* and *Xenofon Maritime SA v. Alliance Assurance Co. Ltd. (The "Captain Panagos DP")* [1986] Vol. 2, LLR 511-512. Evans J stated thus:

> ... But fraud, or any other breach of what I will assume is continuing duty of utmost good faith in relation to the making of claims, also breaks an implied term of the contract, whether or not facts exist which would ground a genuine claim. That breach entitles the insurer to avoid the policy *ab initio* under s. 17 of the Marine Insurance Act 1906, ...

What then is a fraudulent claim? *Halsbury's Laws of England* (Vol. 25) p. 273 provides:

> A claim which is put forward when the assured knows that he has suffered no loss or which is supported by false evidence is clearly fraudulent.
>
> A particular kind of fraud is immaterial. It may contain false statement of facts or it may be supported by fraudulent evidence. (*General Principles of Insurance Law* (*supra*)).

A claim which contains a false statement of facts or which is supported by false evidence is clearly fraudulent. In the present case, DW1 (the branch manager of Kinabalu Adjusters & Surveyors Sdn. Bhd. - "the adjusters") testified that the company was engaged by the defendants to survey the Asiaweld VII after it capsized at Tg. Mani on 26 August 1989, and he first inspected the Asiaweld VII in a capsized position on 29 August 1989. After it had been uprighted and brought to Sibu, DW1 again inspected it and was accompanied by PW1 (the managing director of the plaintiff) and a representative on 20 July 1990. Thereafter, a joint report of the inspection (Exh. P8) was executed by DW1 and PW1. Subsequently, the adjusters informed the plaintiff that items 13, 14 and 15 which appeared beneath their signatures on Exh. P8 were not brought to their attention during the inspection, and requested the plaintiff to confirm that "these items were on board prior to the casualty and produce any relevant documents as evidence..." Items 13, 14 and 15 refer to the missing anchor, anchor winch and landing bridge. Instead, the plaintiff sent the adjusters a letter (Exh. P10) enclosing copies of bills for repairs carried out on the barge as stated in Exh. P9(a), (b) and (c) from Seatrade Sdn. Bhd.

DW1 reinspected the Asiaweld VII on 21 August 1990 and took photographs (Exh. D9(a) - (g)). He testified that items 11, 13, 14 and 15 were not repaired as alleged. Item 16 (Exh. P9) was not damaged and this item was not recorded in the joint report Exh. P8. In a letter (Exh. P13) the adjusters wrote informing the plaintiff that "some of the alleged damage repairs have not been carried out such as starboard aft, single mooring bitt and the forward towing bollard, refitting anchor etc."

The plaintiff in its letter dated 10 September 1990 admitted that the said items were yet to be repaired; "as for the damages which are not attended to as you have mentioned in your fax No. B141/90 dated 5 September 1990, we intend to replace them for the new ones and install them as soon as the goods are received ..." (Exh. P14). It is clear that at that point of time the items had not been repaired yet.

Two months later on 25 October 1990 the adjusters inquired if the items 11, 13, 14 and 15 had been repaired (Exh. D12) and received no response from the plaintiff. So on 3 November 1990 the adjusters wrote to the plaintiff to the effect that items 11, 13, 14 and 15 in Exh. D9 were to be excluded from the plaintiff's claim (Exh. D13).

Some months later, the plaintiff sent 4 photographs (Exh. D15(a)-(d)) allegedly of the Asiaweld VII to the adjusters, but these photographs observed DW1 were not that of Asiaweld VII as there were discrepancies. DW1 testified that the discrepancies noted were as follows:

(a) the welding seam of Asiaweld VII, being an old barge, was corroded whereas the welding seam of the barge in D15 appears to be that of a new barge;

(b) the colour of Asiaweld VII was pale green on the side and rusty brown on the deck whereas in D15 it is black in colour;

(c) the Asiaweld VII had round stanchions but in D15 it had square stanchions.

DW2 was sent to inspect and take photographs of the landing bridge or ramp and the anchor winch and found that they were not there. The anchor as shown in the photograph Exh. D15(c) sent by the plaintiff was not the same anchor as in Exh. D17(c) taken by DW2 on 20 February 1991. He also observed that the colour of Asiaweld VII as on 20 February 1991 was faded green.

PW1 admitted that he sent a letter dated 25 January 1991 in which he enclosed 3 photographs of the Asiaweld VII to the adjusters. It is to be noted that Asiaweld VII was sold to the Golden Dollars Shipping Sdn. Bhd., on 7 June 1990 and PW2 (owner of Golden Dollars) testified that after he bought the Asiaweld VII from the plaintiff, he changed the name of Asiaweld VII to

Matrad 106. It appeared that six months later, PW1 sent 3 photographs of Asiaweld VII to the adjusters and did not mention when these photographs were taken. It might be presumed that the photographs were taken by the plaintiff before Asiaweld VII was sold because after the repairs had been done, Asiaweld VII was sold to the Golden Dollars Shipping Sdn. Bhd., Yet on 3 November 1990 the items 11, 13, 14 and 15 in Exh. D9 were to be excluded from the plaintiff's claim (see above). The plaintiff had failed to give any satisfactory explanation to this.

So what is this charade? If PW1 is to be believed, the Asiaweld VII had been repaired before it was sold. This was confirmed by PW2, the buyer. But the evidence showed that on 20 July 1990 it still was not repaired. PW1 knew or ought to have known that in its claim, items 11, 13, 14 and 15 were not repaired. He knew at the relevant time that his claim was partly false. However, he sought to justify this by stating that he was hard pressed financially, and he submitted the claim hoping to get some payment. In other words he put forward a claim not with the utmost good faith.

PW2 testified that the uprighting of Asiaweld VII was done by his company and he signed the bill dated 19 July 1990 for costs of the uprighting. He testified further that the three items, *viz.*, anchor, anchor winch and landing bridge were on Asiaweld VII when he bought it on 7 June 1990. This cannot be correct because the Asiaweld VII was uprighted on 19 July 1990 (Exh. D8), and the joint inspection on 20 July 1990 showed that these three items were not on board. PW2 and PW1 were good friends and it is not surprising that he was influenced by PW1 which led him to give these factual errors in his testimony. His evidence, to say the least is very unreliable.

PW4, the supervisor of Seatrade Sdn. Bhd. and an employee of PW1, testified that he supplied the anchor, anchor winch and the landing bridge to Asiaweld VII. These were stated in Exh. P9(a), (b) and (c) but these documents were not prepared by him. In the cross-examination he said that he could not recall exactly whether he personally repaired the items. I find it difficult to accept PW4's evidence as the truth in these matters.

On the totality of the evidence, the defendants had proved beyond reasonable doubt that the plaintiff had submitted a fraudulent claim in that the plaintiff had falsely stated that items 11, 13, 14, 15 and 16 in Exh. P9 had been installed and repaired on Asiaweld VII. The plaintiff in making the claim knew or ought to have known that these items had not been installed or repaired. Further the plaintiff had submitted a false evidence to support its claim in the form of the photographs of another barge and not Asiaweld VII, see Exh. D15(a)-(d).

In *The "Litsion Pride"* (*supra*), the shipowners submitted, *inter alia,* false evidence in a letter dated 2 August 1982, which was concocted and false information invented to deceive the underwriters. The House of Lords held that the shipowners were guilty of material fraud in relation to the letter of 2 August 1982.

In *Dome Mining Corporation Ltd. v. Drysdale* [1931] LLLR Vol. 41-109, the plaintiff submitted false evidence by putting forward an engineer's report containing false evidence to support their claim. It was held that the claim was fraudulent and the claim was avoided.

In the present case, the consequence of making a fraudulent claim by the plaintiff, it forfeits all benefits under the marine policy. See *Dome Mining Corporations's* case, (*supra*). However, the plaintiff's claim is fraudulent in part and appears to be honest in relation to other parts of the claim, the entire claim fails because the same becomes tainted with dishonest and fraudulent intent.

In *Lek v. Mathews* [1927] LLLR Vol. 29-141, where the assured had put forward fraudulent claims in relation to part of the stamp collections insured under the policy. The House of Lords gave judgment for the underwriters and the entire plaintiff's claim failed. Further, in the case of *Teh Say Cheng v. North British and Mercantile Insurance Co. Ltd.* [1921] FMSLR 248, the plaintiff claimed for RM67,003.42 but could only prove a loss amounting to RM5,993.73 and failed to adduce any satisfactory evidence as to the balance. The Court held that there was a fraud on the defendants and the plaintiff was entitled to recover nothing under the policy.

Based on the authorities above, although the plaintiff's claim appears to be genuine in part and fraudulent in part, the entire claim fails because the same is tainted with fraudulent intent.

Section 17 of the Marine Insurance Act 1906 provides that if the utmost good faith is not observed by either party, the contract may be avoided by the other party, In *The "Litsion Pride"* (*supra*) Hirst J held that:

> 'avoidance' in s. 17 of the Marine Insurance Act 1906, meant avoidance *ab initio;* s. 17 provided that the policy may be avoided, not that it must be avoided and here in the case of post-contract breach it was open to the underwriters simply to defend the claim without avoiding the policy.

In the present case, the plaintiff had breached the duty of utmost good faith by making a fraudulent claim. In consequence of such breach, the defendants may avoid the policy or simply defend the claim without avoiding the policy.

The defendants had elected to repudiate liability and defend the claim without avoiding the policy. In my judgment, the plaintiff was guilty of making a false claim, and in the event, I would give judgment in favour of the defendants.

The plaintiff's claim is dismissed with costs.